(5)

No. 1042

IN THE

SUPREME COURT OF THE UNITED STATES

W. A. NAILLING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SECOND PETITION FOR REHEARING

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

As petitioner conceives the law and the facts, there was not a tinge nor color of criminality in the issuance of the prescriptions for which he was convicted, and, further, than any construction and application of Section 2554 of the Internal Revenue Code that makes the issuance of such prescriptions a criminal act necessarily extends the operation of that statute into what has heretofore been regarded as forbidden territory.

So believing, and apprehending that an administrative practice, necessarily sanctioned in upholding, or ac-

quiescing in, the conviction in this case, which converts the Harrison Narcotic Law from a revenue measure into an act that primarily regulates the practice of medicine, may not have been sufficiently brought to the attention of this court as the result of a faulty presentation of that important question in the petition and briefs, petitioner in this second petition for a rehearing requests a further consideration of the point thus stated.

All counts on which petitioner was convicted involved prescriptions issued to one Dezonia. He was a confirmed addict. It is a matter of general medical knowledge that such an addict can consume ten grains of morphine in a period of twenty-four hours. Five grains was the maximum amount prescribed for Dezonia during such a period of time. Petitioner knew that Dezonia could use twice that amount during such a period, but limited his prescription to the "minimum" amount needed by Dezonia to relieve the intense pain he suffered (R. 161, 176). There was no reasonable probability that any part of the drug would be used by any other person, and none was so used (R. 109).

The prescriptions to Dezonia were not given indefinitely but for a limited period. Dezonia, advised of this limitation, promised to enter a narcotic institution when his temporary work at Union City was finished, and confirmed that promise by exhibiting to petitioner a letter, showing that arrangements had been made for Dezonia to enter a narcotic institution at Lexington, Kentucky (R. 162, 163). This treatment of Dezonia by petitioner, if the pain and suffering of that addict were to be so alleviated that he could finish his work, was merely preliminary to his later institutional treatment, and for pe-

titioner to have refused it under such circumstances would not only have been a betrayal of his professional obligation to relieve suffering and aid a patient to regain his normal condition but a shocking disregard of fundamental humanities (R. 239).

The prescriptions were filled by registered druggists, and all required records kept for inspection.

Having prescribed the minimum dosage required by Dezonia—this being shown by undisputed testimony—and having done nothing that directly or indirectly tended to defeat the revenue purposes of the Harrison Act or in any way embarrass or affect the collection of revenue, it logically and necessarily follows that petitioner's conviction can only be sustained by extending that act beyond the limits of a revenue measure.

But that is not all.

Many doctors, as shown by the record here (R. 134, 139, 238), refuse to prescribe narcotics for an addict, so refusing because they believe such a prescription would be a violation (R. 134) of federal law—a belief that flatly repudiates the construction thereof by this court.

But that is not all. In the introduction to a series of articles by Dr. Arthus La Roe, President of the American Narcotic Defense Association, published in September, 1941, by the American Weekly, having one of the largest circulations of any magazine in this country, it is stated that the Harrison Act *"makes it a crime for any doctor to give a dose of morphine to an addict."*

The extent to which that belief has been encouraged by administrative practices, is pointed out in the petition for a rehearing (pp. 5-7).

We do not conceive the quoted statement to be the law, but if the professional practice of physicians who entertain that view is the criterion by which the professional treatment of an addict by some other physician, is to be determined, as was the situation in this case, then any physician may be convicted because he refuses to accept such a construction of the law and regulate his practice accordingly.

Each count on which petitioner was convicted must be treated as a separate indictment (Dunn vs. U. S. 284, U. S. 390), and if a physician can be punished for prescribing the "minimum" requirement of an addict for a twenty-four hour period under the circumstances surrounding the issuance of the prescriptions to Dezonia, he can also be punished for giving him a single dose, and thus we have, as charged in the House of Representatives (see page 5 of the petition for a rehearing) an administrative practice that has "set at defiance the clear decisions of the Supreme Court."

Naturally, counsel for petitioner has been reluctant again to bring the issue herein presented to the attention of an overworked court, but believing that "finality *with justice reigning*" expresses the ultimate aim of a judicial inquiry, he has felt justified in so doing because of the great importance to physicians generally of the issue presented and also because he believes that petitioner has been punished for acts that were well within his legal rights as defined by the decisions of this court.

Keeping faith with the individual with whose rights they deal, is an imperative obligation of every agency of government, and never more so than now when the democratic ideal—which emphasizes the dignity of the individual—is engaged in a world-wide struggle for the mastery with the totalitarian concept of government under which the State is everything and the individual nothing.

The principles for which we thus contend is admirably stated by the district court in United States vs. Pardue, 294 Federal 543-548, from which we quote in conclusion:

> "This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government that that of catching one more or less offending criminal—the obligation of keeping faith with the individual * * * and when courts permit a construction of the law (the same principle should apply to application) which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more."

Wherefore, petitioner asks a reconsideration of the action of the court in denying the petition for certiorari and the first petition for a rehearing herein filed.

L. E. GWINN,
Attorney for Petitioner.

I, L. E. GWINN, attorney for petitioner, hereby certify that the foregoing petition is filed in good faith, and not for delay.

L. E. GWINN.